

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
SBC's And VarTec's Petitions for Declaratory	)	WC Docket No. 05-276
Ruling Regarding the Application of Access	)	
Charges to IP-Transported Calls	)	

**REPLY COMMENTS OF  
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER  
ADVOCATES**

The National Association of State Utility Consumer Advocates ("NASUCA")<sup>1</sup> files these brief reply comments in response to various of the comments filed pursuant to the Public Notice in this docket dated September 26, 2005.<sup>2</sup> In the Public Notice, the Federal Communications Commission ("Commission") requested comments on separate petitions for declaratory ruling filed by the SBC incumbent local exchange companies ("SBC") and by VarTec Telecom Inc. ("VarTec"), pursuant to 47 C.F.R. § 1.2.

The comments contain, like the petitions that gave rise to this proceeding, a wide variety of assertions for and against carriers' responsibilities for paying access charges

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<sup>1</sup> NASUCA is a voluntary association of 45 advocate offices in 42 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

<sup>2</sup> FCC 05-2514.

when calls are transported using Internet protocol (“IP”) and connect to the public switched telephone network (“PSTN”).<sup>3</sup> Many of those comments have merit; others do not and should be rejected by the Commission, or, in fact, should be used by the Commission as the basis to reach a decision contrary to the position in those comments.

Consistent with its positions expressed in WC Docket 01-92<sup>4</sup> and in the initial comments here, NASUCA reiterates its position that, in the absence of individualized agreement otherwise, carriers that use the networks of other carriers to complete calls are responsible for compensating the other carriers for the use of their networks. This is true regardless of whether the calls are in IP format.

CBT has the most succinct description of the issues:

“[A] dispute ... over whether access charges are due to the terminating local exchange carrier (LEC) for a long distance call that originates and terminates on the PSTN, but is handed off by the calling party’s interexchange carrier ... to a wholesale transmission provider that uses IP technology that delivers the call to the terminating LEC or intermediary LEC. If access charges are due to the terminating LEC, the parties also seek clarification regarding which carrier (i.e., the calling party’s IXC or the wholesale transmission provider) is liable for payment of access charges to the terminating LEC.”<sup>5</sup>

To begin discussing those issues, NASUCA agrees with EarthLink that if VarTec’s assertions are true that VarTec has no contractual or other relationship with

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<sup>3</sup> Comments responded to here include those of BellSouth Corporation (“BellSouth”); Broadwing Communications, LLC (“Broadwing”); Cincinnati Bell Telephone Company (“CBT”); Cinergy Communications Company (“CCC”); EarthLink, Inc. (“EarthLink”); Global Crossing Telecommunications, Inc. (“Global Crossing”); Joint CLEC Commenters (“Joint CLECs”); Level 3 Communications, Inc. (“Level 3”); PacWest Telecomm, Inc. (“PacWest”); Qwest Communications International Inc. (“Qwest”); SBC; UniPoint Enhanced Services, Inc. (d/b/a PointOne) (“PointOne”); and Wiltel Communications, LLC (“Wiltel”).

<sup>4</sup> See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the National Association of State Utility Consumer Advocates (May 23, 2005); id., Reply Comments of the National Association of State Utility Consumer Advocates (July 20, 2005).

<sup>5</sup> CBT Comments at 2.

terminating incumbent local exchange carriers (“ILECs”) and that VarTec passes off its traffic to other carriers to complete the calls that VarTec carries, “then VarTec is correct that it owes no access charges to the terminating ILECs.”<sup>6</sup> This is true despite the vain attempts by BellSouth in its comments to show that the “other carriers” are agents of VarTec and that, therefore, VarTec is liable for those agents’ actions.<sup>7</sup> Part of the problem with BellSouth’s logic is that, following the chain through to its end, VarTec and the other carriers are all agents of the end-user customer who placed the call -- who cannot and should not be liable for paying intercarrier access charges.<sup>8</sup>

Level 3 states that it is “particularly concerned that the relief that SBC seeks will expose any carrier in the chain of transport to access charges....”<sup>9</sup> NASUCA agrees that “SBC appears to be asserting that both the last party delivering traffic to the terminating LEC(s) and the intermediate carrier are liable for SBC’s access charges.”<sup>10</sup> NASUCA’s proposition -- that the last carrier before termination is the one responsible to pay terminating access charges -- addresses Level 3’s concern.

SBC appears to limit its demands, saying that “interexchange carriers such as VarTec ... are ... liable for access charges on calls routed using IP-in-the-middle technology, *where they know (or should know) that access charges are being avoided.*”<sup>11</sup>

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<sup>6</sup> EarthLink Comments at 6.

<sup>7</sup> BellSouth Comments at 8-11.

<sup>8</sup> NASUCA does agree with BellSouth that it is inherently contradictory for VarTec to seek to avoid liability to pay access charges because it has no contractual relationship with the terminating ILEC but then to seek to recover transiting access charges from that same ILEC in the absence of a contractual relationship. *Id.* at 10. That contradiction is easily resolved by denying VarTec’s request to receive transit charges.

<sup>9</sup> Level 3 Comments at iii.

<sup>10</sup> *Id.* at 11; Global Crossing Comments at 3; PointOne Comments at 23.

<sup>11</sup> SBC Comments at 1 (emphasis added).

SBC now says that it is not seeking double recovery; instead it is looking to “joint and several liability....”<sup>12</sup> It is not clear how SBC’s element of *scienter* (“know or should know”) fits into the joint and severable liability scheme.<sup>13</sup>

NASUCA agrees with Level 3’s and Global Crossing’s analysis of why “an intermediate carrier” that has no direct relationship with the terminating ILEC should not be liable for payment of access charges.<sup>14</sup> Yet if VarTec is not liable for paying terminating access charges to the terminating ILEC, then who is? The answer, as pointed out in NASUCA’s initial comments, is the carrier to which VarTec hands off its traffic and which then actually terminates the traffic on the terminating ILEC’s network.<sup>15</sup> In the context of this discussion, that would not appear to be PointOne, because it does not terminate traffic on the ILEC’s network.

NASUCA disagrees, however, with the comments of PointOne claiming that it cannot be liable for access charges because it is an enhanced service provider (“ESP”) and thus immune from paying access charges under the Commission’s rules.<sup>16</sup> Despite PointOne’s touting of the advanced services that it is **capable** of providing<sup>17</sup> -- and that may be deserving of exemption from access charges (or may not<sup>18</sup>) -- it is clear that the

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<sup>12</sup> Id. at 3. It appears that SBC’s argument on joint and several liability (id. at 16) is tenuous at best, like BellSouth’s argument on agency.

<sup>13</sup> See also Qwest Comments at 4.

<sup>14</sup> Level 3 Comments at 2-4; Global Crossing Comments at 2-3.

<sup>15</sup> See BellSouth Comments at 4-6; CCC Comments at 3; Level 3 Comments at 10.

<sup>16</sup> PointOne Comments at 12.

<sup>17</sup> Id. at 11-12.

<sup>18</sup> Whatever the Commission’s reasons more than two decades ago for establishing the ESP access charge exemption, the nature of the well-established ESP industry and the convergence of all services to IP argue strongly for ending the exemption.

service that PointOne provides to VarTec, which is being addressed in this proceeding, does not involve any enhancement. In fact, just as end-use customers depend on VarTec to transmit their calls without any change, VarTec depends on PointOne forwarding those calls **without change**. Under these circumstances, the *AT&T IP In the Middle Order* applies to this traffic.<sup>19</sup>

NASUCA agrees with BellSouth that it does not matter whether

- one or more entities are involved in the interexchange carriage of the call before it is delivered to the terminating LEC;
- one or more entities engaged in the interexchange carriage of the call consider themselves to be “wholesale” providers, or “retail” providers, or “information service providers,” or “telecommunications service providers,” or “transmission providers,” or “least cost routers;” or
- the technology used to transport the call utilizes “IP-in-the-middle.”<sup>20</sup>

As Broadwing states,

This [current] payment arrangement is elegant in its simplicity. The terminating LEC need only look on the other end of the connecting trunk to determine who is responsible for charges.<sup>21</sup>

According to SBC’s current discussion of the issue, however, PointOne does not terminate traffic onto SBC’s network; instead, PointOne delivers the traffic to competitive local exchange carriers (“CLECs”) who then deliver the traffic to the end-

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<sup>19</sup> See EarthLink Comments at 4, citing *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) (“*AT&T IP In the Middle Order*”).

<sup>20</sup> BellSouth Comments at 4; see also *id.* at 14-16. One hopes that BellSouth realizes that these same principles will apply to traffic it transports.

<sup>21</sup> Broadwing Comments at [2].

user's ILEC (in this case, SBC).<sup>22</sup> In this case, then, it appears that these CLECs are acting as IXCs, and thus should be liable to pay access charges.<sup>23</sup>

PointOne asserts as another reason why it should not pay access charges that it “has never entered into any sort of customer-provider relationship with SBC related to the traffic at issue in this proceeding, and it has not ordered access service from SBC or anyone else either directly or constructively.”<sup>24</sup> In that event, what would give PointOne the right to terminate its traffic on SBC's (or anyone else's) network? Apparently, nothing: PointOne instead has a relationship with the CLECs who terminate the traffic, and which in turn have relationships with the end-user's LEC. Yet “access charges do not ... apply to any local exchange carriers -- unless depending on the specific facts, the LEC is not operating as a LEC but as an IXC.”<sup>25</sup>

Part of the problem here is that end users, and the carriers who transmit their calls, are hobbled by -- or, on the other hand, taking advantage of -- essentially antique definitions. This includes a definition of ESP that does not leave open the possibility that the ESP also carries “non-enhanced” traffic and in that situation is not an end-user but a carrier,<sup>26</sup> and a definition of “interexchange carrier” that appears to exclude ESPs.<sup>27</sup> The

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<sup>22</sup> SBC Comments at 5.

<sup>23</sup> This is another reason supporting the development of a unified intercarrier compensation regime, where all carriers terminating traffic -- whether “local,” “long-distance,” or whatever -- pay the same rate to the end-user's LEC for the use of its network.

<sup>24</sup> PointOne Comments at 25.

<sup>25</sup> Joint CLECs Comments at 4. Which is not to say, of course, that LEC/LEC non-interexchange traffic should be transferred free of charge; just not at “access charge” levels.

<sup>26</sup> This appears to be the main basis on which PointOne claims exemption from paying access charges. See PointOne Comments at 21.

<sup>27</sup> NASUCA agrees with Level 3's agreement with SBC “that if the call should have been delivered using an access service, it makes no difference whether the party delivering the call holds itself out to be an IXC.” Level 3 Comments at 10.

Commission must update and rationalize the definitions in its rules.

In that regard, NASUCA heartily agrees with some commenters that because of the pendency of other proceedings and the importance of the issues at stake, the Commission should not and cannot change its rules in response to these dueling Petitions for Declaratory Ruling.<sup>28</sup> Changes in Commission rules are not needed, however, to grant VarTec's petition for a declaration that it is not liable for payment of access charges to the terminating ILEC and to deny VarTec's petition for a declaration that the terminating ILEC is liable to VarTec for transiting charges. SBC's petition is more complicated: The Commission could declare that PointOne's traffic is not enhanced and thus -- for that traffic -- PointOne should not be treated as an ESP but as a carrier, making the CLECs on whose networks PointOne terminates its traffic responsible for paying access charges to SBC.<sup>29</sup>

Level 3 requests that the "Commission should make clear that ... this proceeding ... applies only to situations where the long distance traffic originates as PSTN traffic and terminates as PSTN traffic, i.e., there is no [net] protocol conversion."<sup>30</sup>

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<sup>28</sup> See, e.g., PointOne Comments at 21-22.

<sup>29</sup> This will likely cause the relationship between those CLECs and PointOne to change or be dissolved. See PacWest Comments at 2. Then VarTec will have to find some other carrier to accept its handed off traffic.

<sup>30</sup> Level 3 Comments at 14.

It may be that in the situation diagrammed by Level 3,<sup>31</sup> there is no requirement to pay interexchange access charges.<sup>32</sup> But in the upcoming unified intercarrier compensation world, there should be no question that the carrier terminating traffic on the end user's network would owe compensation to the end user's local carrier.

Respectfully submitted,

/s/ David C. Bergmann  
David C. Bergmann  
Assistant Consumers' Counsel  
Chair, NASUCA Telecommunications  
Committee  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Phone: (614) 466-8574  
Fax: (614) 466-9475  
[bergmann@occ.state.oh.us](mailto:bergmann@occ.state.oh.us)

NASUCA  
8380 Colesville Road, Suite 101  
Silver Spring, MD 20910  
Phone: (301) 589-6313  
Fax: (301) 589-6380

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<sup>31</sup> See id.

<sup>32</sup> This also addresses PointOne's assertion that it

has no reason to differentiate among these various types of traffic; from the perspective of PointOne's network, all of this traffic consists of IP packets. As a result, there is no reason for PointOne to track which traffic is PSTN-to-PSTN for the purpose of enabling SBC to collect access charges.

PointOne Comments at 24. It should be recalled that the reason PointOne has no reason to track this traffic is the regulatorily-bestowed exemption from paying access charges or any other compensation to SBC (or any other LEC) for the use of its networks.